SOME RECENT DEVELOPMENTS IN CASE LAW

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Fischer v Howe [2013] NSWSC 462

In *Fischer v Howe*,[1] the plaintiff, Henry Fischer, was the son of the late Marie Fischer ('the deceased') who died on 6 April 2010. Mr Fischer claimed damages in negligence against Graham Howe, a solicitor, on the basis that he failed to make an informal will reflecting the deceased's instructions to make changes to her will made in November 2009.

The deceased had made at least 9 different wills during her lifetime. In 2007, a series of four wills were made around the same time as the deceased removed her daughter, Ms Marmont, as her attorney under a power of attorney and excluded Ms Marmont as a beneficiary of her estate.

In about March 2010, the deceased asked her general practitioner, Dr Zwi, whether she could suggest the name of a solicitor as she had 'lost confidence' in her current solicitor and accountant. Dr Zwi discussed the deceased with the defendant, who was also a patient of Dr Zwi. Dr Zwi informed the defendant that the deceased was elderly, frail but 'had all her marbles'. Based on the referral received from her GP, the deceased's career, Ms Knight, telephoned Mr Howe and he then spoke with the deceased. She informed the defendant that she needed assistance to make a new will and, as she had difficulty getting about, asked that he attend on her at her home.

On 25 March 2010, Mr Howe met with the deceased and spent about 1.5 hours obtaining instructions as to the terms of the will that the deceased wished to make to replace the 2009 will. The instructions to the defendant indicated that the deceased's estate was substantial. The deceased provided instructions that included making changes to the nominated executors as she had lost confidence in her accountant who was one of the executors, a minor charitable bequest, a gift to Ms Knight, and the division of her residuary estate between her son (as to 50%), her grandson (25%) and grand-daughter (the remaining 25%).

The deceased had asked the defendant whether he would be prepared to be appointed as her executor. He suggested that that she think about whom she wanted and that she could give her instructions to him when he provided the draft will to her.

She also instructed Mr Howe that she did not want her daughter, Ms Marmont, to be a beneficiary as she was upset that her daughter had 'abandoned her in a nursing home' after a fall and had removed jewellery and furniture from the deceased's home whilst she was admitted to hospital and convalescing in the nursing home. In response to this, Mr Howe advised the deceased of the potential for her daughter to make a Family Provision claim and discussed the matters considered by a court in these types of claims.

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[1] [2013] NSWSC 462.

During the meeting, the defendant inferred that the deceased was in her nineties from the ages of her children, saw no evidence that the deceased was ill but was aware that she had some mobility issues.

Whilst he did not have a copy of the deceased's 2009 will and was unaware of the disposition of the estate under that will, he was aware of the fact that the deceased wanted the two executors named in that will removed. In fact, the instructions provided to the defendant made significant changes to the disposition of the deceased's estate from the gifts in the 2009 will. However, the defendant did not make inquiries of the deceased about the terms of her 2009 will.

At the end of the meeting, the defendant informed the deceased that he would be interstate on leave over the Easter period and would return to visit her in the week following Easter with a draft will. The defendant agreed and indicated that she wanted the plaintiff present at the meeting.

During the trial, the defendant admitted that he had not considered making an informal handwritten will at the initial meeting or in the days following the meeting despite the fact that he had attended a conference at which a paper was delivered entitled 'Informal and Statutory Wills' that referred to a 2009 judgment where a handwritten document dated but unsigned was held to be a valid will.

On the evening of 25 March 2010, the deceased became unwell and, the following day, Dr Zwi diagnosed that the deceased was suffering from pneumonia. Her condition worsened over the course of the next four days – a period when the defendant was working. His leave commenced on 31 March 2010.

The deceased died on the Tuesday after Easter, 6 April 2010 without having made her new will.

The issue for consideration by the court was whether the defendant ought to have prepared an informal will or had the deceased sign the file note that he had made during the course of the initial conference.

Two expert witnesses, very experienced succession practitioners, prepared a joint report to assist the court. Ms Pamela Suttor, relied on by the plaintiff, gave evidence that the defendant ought to have prepared an informal will or obtained the deceased's signature to his file note. Ms Suttor considered such steps would be taken by a competent solicitor aware of the circumstances of the deceased and of the fact that the changes she wished to make to her current will were significant.

Mr Richard Neal, relied on by the defendant, gave evidence that competent professional practice needed to be assessed by reference to 'whether there was something of an immediate dispositive nature to be achieved'. Whilst there may be circumstances where it was imperative for an informal will to be raised with the will-maker, there was a range of conduct that was competent practice. However, he accepted that competent practice required the consideration of an informal will being signed.

The plaintiff submitted that the defendant owed him a duty of care to make a will in accordance with the deceased's instructions and, having regard to the deceased's age,

mobility problems, her settled instructions, significant changes to the terms of the 2009 will and the defendant's impending leave, the defendant should have made an informal will on 25 March 2010. The plaintiff also submitted that the *Civil Liability Act 2002*[2] did not exonerate the defendant's negligent conduct.

The trial judge rejected the defendant's submission that the scope of his retainer was to prepare a formal will and that as the deceased had accepted his timeframe for doing so, he was not in breach of his retainer and, as a result, not in breach of a duty of care to the deceased or the plaintiff. The judge held that the scope of the defendant's retainer '*was to give legal effect to the deceased's testamentary intentions*' and was not limited to preparing a formal will. As section 8 of the *Succession Act*[3] provides a mechanism to achieve the legal effectiveness of the deceased's testamentary intentions, it should have been considered by the defendant.

The judge held that the plaintiff was owed a duty of care by the defendant and that the failure to make an informal will on 25 March 2010 was a breach of that duty of care.

The plaintiff's submission on causation, accepted by the judge, was that the deceased, if she had been advised of the option to make an informal will on 25 March 2010 would have done so. The defendant's failure to raise this option with the deceased was the cause of the plaintiff's loss.

The judge considered that only express instructions from the deceased that she did not want to make an informal will would have relieved the defendant from the obligation to make an informal will.

Further, the trial judge found that the defence under section 5O of the *Civil Liability Act*[4] (i.e. the defence available to professionals who follow the competent practice of their peers) was not available as the defendant had not followed competent professional practice.

For these reasons, the plaintiff was entitled to damages for the loss occasioned by the defendant's negligence.

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***Groves v Groves* [2013] NSWSC 623**

In *Groves v Groves*,[5] Michelle Groves, the daughter of the deceased, commenced a Family Provision claim against her father's estate.

The deceased died on 21 December 2010 leaving a will dated 30 September 2004 in which he left his entire estate to Mary Groves, the deceased's widow and defendant in the proceedings.

The assets that were solely owned by the deceased amounted to approximately $94 000.00. At the time of his death, the deceased and Mary Groves owned significant assets as joint

[2] *Civil Liability Act 2002* (NSW) s 5.
[3] *Succession Act* 2006 (NSW) s 8.
[4] *Civil Liability Act* 2002 (NSW) s 5O.
[5] [2013] NSWSC 623.

tenants and, on the deceased's death, these assets passed to Mary Groves by way of survivorship.

After considering the plaintiff's claim, the trial judge considered that an order in favour of the plaintiff of $150 000.00 was appropriate.

The estate liabilities and the defendant's costs had consumed the entire estate (being assets held solely by the deceased). Therefore, to give effect to the order for provision and an order that the plaintiff's costs be paid, the judge considered that it was appropriate make an order designating the moneys held jointly by the deceased and his wife at the time of his death as notional estate. The judge considered that the deceased's failure to sever the joint tenancy (eg by transferring his share of the funds to himself thus severing the joint tenancy in equity) was a relevant property transaction.

Therefore, the entire provision for the plaintiff (as well as her costs) was ordered to be paid from the notional estate of the deceased.

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***Gray v Hart & Ors* [2012] NSWSC 1435**

In *Gray v Hart & Ors*[6] the deceased, Betty Harris, died on 17 September 2009 leaving an estate in excess of $12.5 million. Her nearest living relatives were two nieces and two nephews (although she was not close to any of her relatives).

In her will made on 9 July 1996, she appointed her niece, Coralie Hart, and a solicitor, Richard Spinak, as executors. The will made provision for gifts of $100,000.00 to each of two of her sisters and the residue of the estate passed to Ms Hart. At the time of her death, the deceased's sisters had predeceased her so Ms Hart would be entitled to the whole of the estate.

On 23 March 2005, the deceased had made a will revoking all prior wills (but containing no dispositive provisions). On 31 March 2005, the deceased made an informal testamentary document that gave her entire estate to her neighbours, Robert and Beatrice Gray. On 4 April 2005, the deceased executed a formal will in the same terms as the informal testamentary document of 31 March 2005.

Following the deceased's death, Ms Hart and Mr Spinak sought to have the 1996 will admitted to probate. Coralie Hart contended that the deceased lacked testamentary capacity to make the wills in March and April 2005. Further, she alleged that the 2005 wills were made at a time when Mrs Harris was under the undue influence of Mr or Mrs Gray and that as they were complicit in the creation of the documents that Mrs Gray (Robert Gray having predeceased the deceased) had the onus to dispel any suspicion surrounding the creation of the April 2005 will. Beatrice Gray sought probate of the 4 April 2005 will. In addition, the deceased's two nephews and her other niece contended that the deceased lacked testamentary capacity to make the 4 April 2005 will but asserted that she had capacity to make the will on 23 March 2005 (revoking the 1996 will and resulting in an intestacy). The nephews and niece (and Ms Hart) would be entitled to whole of the estate on intestacy.

[6] [2012] NSWSC 1435.

The trial of these disputes was conducted over a 10 day period in February 2012. During the trial, a significant amount of evidence was heard regarding the deceased's relationship with the parties, her health and her management of her financial affairs. All of this evidence provided a useful background to the critical events in the four month period leading up to the will of 4 April 2005.

The deceased was hospitalised in December 2004 with a bowel obstruction, underwent surgery and remained in hospital until 9 February 2005. During her hospitalisation, she was diagnosed by Dr Beveridge, a geriatrician, with moderately severe dementia.

Following her return to her home on 15 February 2005, Mrs Harris apparently was angered by the fact that following an application by Ms Hart in January 2005, orders had been made by the Guardianship Tribunal for the appointment of guardians and a financial manager. Mrs Harris was angry that documents had been removed from her home, that she was unable to use her chequebook as her account had been closed and was reliant on loans from her other niece and Mr & Mrs Gray. Her anger was directed at Ms Hart.

In mid-March 2005, Mr and Mrs Gray arranged for the deceased to be assessed by Professor Watson, a consultant neurologist, and Ms Roberts, a clinical and consulting neuro-psychologist. They formed the opinion that Mrs Harris did not suffer from dementia and that she had testamentary capacity.

In August 2005, Mrs Harris was again assessed by both Dr Beveridge, who again concluded that Mrs Harris was suffering from significant dementia, and by Professor Watson, who affirmed his earlier opinion that she was not suffering from dementia and was capable of managing her financial affairs with some assistance.

The trial judge carefully considered the expert medical evidence, the evidence of the solicitors and the history of events prior to and subsequent to the documents made in March and April 2005. The judge rejected Dr Beveridge's opinion that the deceased suffered from a paranoid ideation or delusion. Indeed, the evidence suggested that her belief that relatives were 'out to get her money' was not an irrational belief but, in respect of some relatives, appeared to be correct.

The judge also considered the test of capacity necessary to revoke the 1996 will (with the result that the estate would pass on intestacy) and the case of revoking a specific gift in a will so that the benefit of the gift passed under the remaining provisions of the will. The judge held that in order for the revoking document of 23 March 2005 to be valid, the deceased had to satisfy the tests set out in the seminal case of *Banks v Goodfellow*.[7]

The trial judge favoured the opinion of Professor Watson to that of Dr Beveridge. The judge considered that Dr Beveridge had not accurately assessed the cause of the deceased's 'apparent incapacity' in late 2004/early 2005 during her hospitalisation. He found that the deceased was able to assess the claims on her estate and suffered from no disorder of the mind that affected her ability to discriminate between those claims or that influenced her decisions.

[7] (1870) LR 5 QB 549.

The trial judge also noted that although the Grays were instrumental in arranging the services of a lawyer to meet with the deceased regarding a will, they did not play any role in ‘framing the will in their favour’. As a consequence, the doctrine of suspicious circumstances did not arise. In any event, the judge held that the deceased ‘knew and approved of the contents of each will’.

After a careful and extensive analysis of the evidence, the judge found that the deceased had capacity to make the wills of 23 March 2005 and 4 April 2005.